NO. 2017

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR VON ARX, Plaintiff in Error,

vs.

A. J. BOONE, Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,
Attorney for Plaintiff in Error.

NO. 2017

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR VON ARX, Plaintiff in Error,

vs.

A. J. BOONE, Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

J. H. COBB,
Attorney for Plaintiff in Error.

STATEMENT OF THE CASE

This is an action in ejectment brought by the plaintiff in error against the defendant in error, to recover the possession of certain lots and buildings in Douglas City, Alaska, and rentals for the withholding thereof. The parties hereinafter will be respectively referred to as plaintiff and defendant.

The plaintiff in his complaint alleged ownership of the property and a possessory title thereto and plead and claimed a common source of title in plaintiff and defendant, respectively from one Edward Erlich, (Rec., 1-2).

The defendant in his answer denied generally all the allegations of the complaint and further specifically alleged title from and under Edward Erlich by virtue of a certificate of purchase made by the United States Marshal for the District of Alaska, Division No. 1, on May 2, 1910, in cause No. 667-A which certificte is set out in full in the answer, (Rec., 5-7.)

This certificate of purchase purports to be made by virtue of a writ of execution issued out of the said court on the 8th day of March A. D. 1910 in cause No. 667A in favor of J. M. Jenne, plaintiff and against Edward Erlich, defendant, and further recites a levy on the property in controversy made on the 9th day of March, 1910, and a sale thereunder of all the interest of the said Erlich held on the 8th

day of December, 1908, or at any time thereafter.

The defendant by his reply denied that Erlich was the owner or had any right or title of interest in the property at the time of the proceedings in the answer alleged, but admitted that such proceedings constituted the nature and basis of the defendant's claim to said property.

The plaintiff introduced in evidence the following chain of title.

First: A deed from Ed Erlich to Alexander Smallwood conveying the property in controversy and other property. Dated February 13, 1905. (Rec., 17-20.)

Second: A power of attorney from Alexander Smallwood to Edward Erlich dated April 16, 1907. (Rec., 23-25.). This power of attorney is a general one.

Third: A deed from Alexander Smallwood by Edward Erlich, his agent and attorney in Fact to the plaintiff, Victor Von arx, dated July 18, 1910, conveying the property in controversy. (Rec., 27-28).

Fourth: Plaintiff next offered the admission of the defendant that the property in controversy was of the reasonable rental of $30.00 per month. (Rec., 29).

The plaintiff was next sworn as a witness on his own behalf and testified in substance; that in the year 1905 and prior to that time Edward Erlich was

in the possession of the property in controversy carrying on business therein and had improved the same. Rec., 30-32).

The defendant then offered in evidence the following evidence to wit:

First: A purported decree of the District Court for Alaska Division No. 1 in cause No. 667A entitled J. M. Jenne, Plaintiff, Vs. Edward Erlich, Alexander Smallwood and L. A. Slane, Defendants. This decree is in the ordinary form and purports to foreclose a mortgage executed by Edward Erlich in favor of J. M. Jenne dated November 2, 1902, for the sum of $1,000.00, and also a mortgage executed by Edward Erlich in favor of the defendant, L. A. Slane, dated July 2, 1902, for the sum of $400.00 and directing a sale of the property. (Rec., 35-38).

Second: A deed from the United States Marshal to Edward Erlich dated the 5th day of March, 1910. (Rec., 39-42).

This instrument recites among other things: That "whereas, at the regular December, 1908 term of the district Court of the United States held at the town of Juneau, and for said District and Division on the eighth day of December, in the year A. D. 1908, J. M. Jenne, plaintiff, and L. A. Slane, one of the defendants respectively recovered judgment against Edward Erlich, defendant, in a certain plea for the following sums, to wit: eleven hundred three dollars and two cents ($1103.02) and twenty-nine dol-

lars and ten cents ($29.10) costs of suit, and six hundred twenty-one dollars and eighty-three cents ($623.83); and

"Whereas, on the 28th day of December, A. D. 1908, there issued out of said District Court an order of sale and execution in the said action for the collection of said judgment, which said order of sale and execution was directed to James M. Shoup, the then United States Marshal in and for said District of Alaska, Division No. One, and that said order of sale and execution were executed by the said James M. Shoup, the then United States Marshal, by said case made and provided on the first day of February, A. D. 1909, upon a certain tract or parcel of land hereinafter described," etc. The deed then further recites in substance the due advertisemnt of part of th property in controversy for sale and the sale thereof to one George Meyers. It further recites the payment by Edward Erlich the amount of the purchase price and costs within the year allowed by law for redemption, to wit, the 5th day of March, 1910. The deed then proceeds,

"Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of one hundred ninety-three and 23-100 dollars ($193.23) in hand to me paid by the said Edward Ehrlich party of the seond part, have granted, bar-

gained and sold and by these presents do grant, bargain and sell unto the said Edward Ehrlich all the right, title, interest and claim, which the said defendant Edward Ehrlich and Alex Smallwood on the day of sale aforesaid, had in and to the following described tract or parcel of land, to wit:" then following a description of part of the property in controversy. (Rec., 39-42.)

Third: A Marshal's deed of the United States Marshal for Alaska, Division No. 1, to the defendant, identical in its recitals with the former, and purporting to convey the remainder of the property in controversy. (Rec., 43-46.)

Fourth: The defendant next offered in evidence a writ of execution issued in Cause No. 667A, dated March 8th, 1910, which execution recites a judgment in favor of J. M. Jenne against Edward Ehllich defendant, for the sum of one thousand three and 2-100 dollars ($1,003.02) and the sum of twenty-nine and 10-100 dollars ($29.10) costs. It further recites a credit upon said judgment of one hundred sixty-six and 25-100 dollars ($166.25). It then directs that the balance nine hundred seventy-nine and 7-100 dollars ($979.07) be made out of the property of the said Edward Ehrlich. (Rec., 48-49.)

Fifth: The return upon said execution showing that on the 2nd day of May, 1910, that the property in controversy was purchased thereunder by the defendant, A. J. Boone for the sum of $825.00. (Rec.,

50-54.)

Sixth: An order of the Court confirming said sale. (Rec., 56-57.)

Seventh: A certificate of purchase executed by the Marshal to the defendant, A. J. Boone, certifying that on the 2nd day of May, 1910, he sold under the execution aforesaid all the right, title, and interest of the defendant Edward Ehrlich, in and to the property in controversy. (Rec., 58-60.)

Eighth: The defendant called as a witness in his own behalf testified in substance that he had been in possession of the property for some 18 months and that he was the person who purchased the property at the Marshal's sale and received the certificate of purchase and had paid the purchase money named therein. (Rec., 61-62.)

The plaintiff in rebuttal, for the purpose of showing the invalidity of the purported decree of foreclosure as against Alexander Smallwood, offered the balance of the judgment roll therein, to wit:

First: Affidavit for publication of summons. (Rec., 63-64.)

Second: The order for publication of summons. (Rec., 66-67.)

Third: The summons for publication. (Rec., 68-69.)

Fourth: Proof of publication. (Rec., 69.)

Fifth: The summons. (Rec., 70-71.)

Sixth: The Clerk of the Court was called as a wit-

ness, who testified in substance; that there was no affidavit or proof of mailing the summons for publication to the defendant Smallwood prior to the date of the judgment therein in cause No. 667A; that there was an afidavit filed April 30, 1910, as of April 25, 1908; that this was done pursuant to the following order:

"Victor Von Arx vs. J. M. Jenne, A. J. Boone and D. A. Sutherland, as Marshal for the District of Alaska, Division No. 1. 781-A. Trial continued. On this day this cause came on again regularly for trial; came the plaintiff and counsel John G. Heid, Esquire; came likewise the defendant and counsel, Z. R. Cheney, Esquire; whereupon the following proceeding were had, to wit: Plaintiff's Exhibit "C" was offered in evidence: whereupon and affidavit of mailing a copy of the complaint and summons was ordered filed nunc pro tunc as of April 25, 1908." (Rec., 72-77.)

This order was made in cause 781-A not cause 667-A and was made April 30, 1910. (Rec., 76.). The defendant then offered the evidence the Affidavit. (Rec., 78-80.)

This was all the evidence introduced by either parties. At the conclusion of the evidence both parties moved the court for a directed verdict. (Rec., 83-84.)

The Court thereupon denied the plaintiff's motion for directing a verdict and granted the defendant's

to which the plaintiff accepted. (Rec., 92.)

It is contended by the plaintiff in error, First: the decree in cause No. 667-A is absolutely void as against all the defendants thereto.

Second: That if not void as to all the defendants it is void as to the defendant Alexander Smallwood.

Third: That even if said decree is not void as to any of the parties thereto the proceedings had thereunder failed to divest the title out of Alexander Smallwood, the owner of the property, at the time such proceedings were had and that the plaintiff in any event was entitled to a directed verdict in his favor.

In order to present these questions squarely to the Court we will briefly state the record: The affidavit for publication of the Summons (Rec., 63-64) shows that at the time said suit was brought Smallwood was a non-resident of the District of Alaska and there was no pretense that personal service of the summons was ever had upon him. The order for the publication of the summons, (Rec., 66-67) directs that the summons be published in the Transcript, a weekly newspaper printed and published in Juneau, Alaska, for the period of six weeks, once in each week, and the plaintiff's attorney mail a copy of said summons and complaint in said cause to the defendant, Alexander Smallwood at his place of residence in British Columbia forthwith.

The summons for publication, (Rec. 68-69) com-

mands the defendant Alexander Smallwood to appear "within thirty (30) days after the completion of the period of publication of the summons." It gives the date of the order for the publication of the summons but does not states the period prescribed for the publication. (Rec. 70-71.)

The decree shows that none of the defendants appeared and bears date the 8th day of December, 1908. At that time there was no proof on file that a copy of the summons and complaint had been mailed to Alexander Smallwood, such proof not being made until the 28th day of April, 1910, when it was filed non pro tunc pursuant to an order made on April 30, 1910, in cause No. 781-A entitled Victor Von Arx vs. J. M. Jenne, A. J. Boone and D. A. Sutherland. There was never any order made in Cause No. 667-A in which the judgment was rendered.

At the conclusion of the evidence the Court ruled and held that the decree was valid in cause No. 667-A and that the proceedings thereunder as shown by the evidence was sufficient to divest the title out of Smallwood and thereupon denied plaintiff's motion for an instructed verdict and granted the motion of the defendant for an instructed verdict.

Verdict was returned accordingly and judgment entered thereon and to the judgment this Writ of Error is sued out and the plaintiff assigns the following errors:

FIRST

"The Court erred in ruling and holding that the proceedings in cause No. 667-A, entitled J. M. Jenne vs. Alex. Smallwood et al., were valid as against said Smallwood and that the decree herein and proceedings thereunder divested Smallwood of the title to the property in controversy."

SECOND

"The Court erred in directing the jury to return a verdict for the defendant."

THIRD.

"The Court erred in refusing to direct the jury to return a verdict for the plaintiff." (Rec. 98.)

ARGUMENT.

From the foregoing statement it is apparent, that plaintiff having a regular chain of title from and under Ehrlich through Smallwood, was entitled to recover, unless, by the proceedings instituted in 1908, in the case of Jenne vs. Ehrlich, Smallwood and Slane, the then title of Smallwood was in some way divested out of him, and vested again in Ehrlich, and thence in the defendant Boone.

There are two reasons why the title of Smallwood was not affected by such proceedings:

FIRST: THE JUDGMENT, or DECREE IN CAUSE 667-A IS VOID.

SECOND: EVEN IF SUCH DECREE WERE

VALID THE PROCEEDINGS IN QUESTION WERE INSUFFICIENT TO PASS SMALLWOOD'S TITLE TO EHRLICH; AND EHRLICH HAD NO TITLE TO BE AFFECTED BY THE JUDICIAL SALE HAD IN 1910 UNDER THE EXECUTION IN CAUSE NO. 667-A.

FIRST: THE INVALIDITY OF THE DECREE IN CAUSE 667-A OF DATE DEC. 8, 1908.

The judgment roll in the case shows that Smallwood was a non-resident of Alaska. Substituted service of process was attempted to be made upon him. Is it sufficient to give the court jurisdiction, under the Alaska Statutes?

Section 47, Carter's Code, provides for constructive service in a case such as that of Jenne vs. Ehrlich et al. No. 667-A.

The sixth subdivision of the section provides further that "The summons published shall contain the name of the Court, and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint."

Section 48 reads as follows:

"MANNER OF PUBLICATION. The order shall direct the publication to be made in a newspaper to be designated by the court or judge or clerk as the most likely to give notice to the person to be serv-

ed, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the district shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer within thirty days after the completion of such period of publication. In case of personal service out of the district, summons shall specify the time prescribed in the order for publication.

Section 52 provides:

"Proof of the service of the summons, or of the deposit thereof in the post-office, shall be as follows:

First: If the service, or deposit in the post-office be by the Marshal or his deputy, the certificte of such officer;

Second: If by any other person his affidavit thereof."

Waiving any question as to the sufficiency of the affidavit for the publication and the order, (though both are questionable) let us examine the summons and the proof of service.

The order directed the summons to be published "in the Transcript, a weekly newspaper printed and published at Juneau, Alaska, for the period of six weeks, once in each week and that plaintiff's attorney mail a copy of said summons and complaint in said cause to the defendant, Alex. Smallwood, at his place of residence, in British Columbia forthwith." (Rec. 66-67.)

The summons commands the defendant Smallwood to appear in "thirty days after the completion of the period of publication."

"The order for publication of this summons is dated April 23, 1908." (Rec. 68-69.)

Will G. Ulrich, publisher of the "Alaska Weekly Transcript" makes affidavit July 1, 1908, that the summons had been published in each weekly issue of said paper for 7 consecutive weeks, the first publication being May 2nd and the last June 13, 1908. (Rec. 69.)

There was no other return to the summons or other proof of compliance with the order of Court in the record. (Rec. 71-76.)

On December 8, 1908, on this record the Court proceeded to render the decree.

Subsequently in cause No. 781-A the Court made an order dated April 30, 1910, permitting an affidavit of posting to be filed, NUNC PRO TUNC. (Rec. 76.)

The attorney for defendant thereupon filed the

following affidavit:

UNITED STATES OF AMERICA,

DISTRICT OF ALASKA—SS.

"Z. R. Cheney, being first duly sworn, on oath deposes and says: I am the attorney for A. J. Boone and D. A. Sutherland, two of the defendants in cause No. 781-A of the records and files of this court; said cause is a suit for an injunction wherein the plaintiff, Victor Von Arx, alleges in his complaint, among other things, that the judgment and decree of this Honorable Court, dated December 8, 1908, is void for the reasons, (1) that the record shows no proof of the mailing of the copy of summons and complaint to Alex. Smallwood, one of the defendants in cause No. 667-A of this Court, as required by the order for publication of summons, made and entered in said cause No. 667-A, on April 23, 1908, (2) because there is no proof of service upon either Edward Ehrlich or Alex. Smallwood, defendants in cause No. 667-A, of a copy of the answer of L. A. Slane, one of the defendants in said cause; that the property mentioned and described in the decree is the same property mentioned and described in the executions issued upon said decree and which the plaintiff Von Arx is attempting, in cause No. 781-A, to obtain an injunction to prevent defendant from selling said property.

"Affiant further states that he was the attorney

for J. M. Jenne, plaintiff in cause No. 667-A, and that he knows that the copy of the summons and complaint in said cause was mailed on or about the 25th day of April, 1908, affiant further says that on or about the 20th day of April, 1908, while acting as such attorney for J. M. Jenne, he made a trip to Douglas, Alaska, to see Edward Ehrlich and obtain from him the address of the said Alex. Smallwood; that he found Edward Ehrlich at the Beach Store and Lodging House in said Douglas, Alaska, and that said Ehrlich in said affiant's request for such address gave affiant the following address: 'Alex Smallwood, Riverside P. O., Log Valley, Sask., B. C.;' that thereafter on April 23, 1908, affiant filed an affidavit in said cause No. 667-A showing the non-residence of the said Alex. Smallwood and asked for an order of publication of summons as required by law; that on the same day an order for the publication of said summons was duly made and entered in said cause; to which order reference is hereby made; that about two days thereafter, to wit: on or about April 25, 1908, this affiant deposited in the United States post-office at Juneau, Alaska, in a sealed envelope addressed to Alex. Smallwood, Log Valley, Sask., B. C., a true copy of said summons and complaint in said cause No. 667-A, as provided in said order of Court; that said envelope had on the outside thereof a return card giving the name and ad-

dress of sender of said letter; that affiant never received any reply from said Alex Smallwood and the said envelope was never returned to affiant.

"Affiant further says that he is informed and believes and therefore states the fact to be that the defendant L. A. Slane on or about the 2nd day of September, 1908, at Douglas, Alaska, served a copey of his answer in said cause upon the defendant Edward Ehrlich personally and as agent of said Alex. Smallwood. Further affiant saith not."

Z. R. CHENEY.

"Subscribed and sworn to before me this 28th day of April, 1910.

(Notarial Seal) NEWARK L. BURTON,
Notary Public for Alaska."

Rec. 78-80.)

That when a court proceeds to render judgment or decree upon substituted service of its process every step prescribed by the statute must be strictly complied with in order to authorize such decree, is an axiom of the law of judgments.

Passing the minor irregularities in the proceedings leading to the decree in question, there are two defects, so gross as, in our opinion, to render the decree plainly void:

First: The summons itself was void, in that it failed to state the "TIME WITHIN WHICH THE DEFENDANT WAS REQUIRED TO ANSWER THE COMPLAINT."

The provisions of the Alaska Code governing the necessary prerequisites to a judgment on substituted service are taken directly from the code of Oregon. At the time of their adoption by Congress, they had received a definite construction. In the case of Odell vs. Campbell, 9 Ore. 298, the Supreme Court of Oregon had before it the question whether a summons, served by publication which failed to state the date of the order for publication would support a judgment, and the Court said:

"The next objection is, that the summons published does not contain the date of the order for service by publication. Section 55 of the code of procedure provides, among other things, that 'Summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint.' The summons published in this case contains all these several matters except the date of the order for service by publication. Where the statute prescribes certain things which the summons published shall contain, they must be deemed essential and necessary, and the absence of any of them in the summons published is not a compliance with its requirements. Nor do we think that this provision of the statute is merely directory, as claimed, but mandatory. For, if the summons may omit the date

of the order for service by publication, and still be held sufficient, why not with equal reason, 'the succinct statement of relief demanded,' or the name of the court and title of the cause, or any other matter which this provision requires the summons shall contain? In the eye of the law one is as essential as the other, and none can be omitted without vitiating the summons published. It seems to us no one would claim a summons which omitted to state these matters required by the statute, could be held valid.''

In this case it is true, the omission was of the date of the order of publication, while here the defect is the failure to state the time within which the defendant is to appear. But the reason for one is as strong as for the other; each is a requisite prescribed by the statute.

Odell vs, Campbell is cited with approval by Judge Deady in Swift vs. Meyers 37 Fed. 37.

But it may be contended the summons does state that the defendant is commanded to appear "within thirty days after the completion of publication'' and that this is sufficient. But is it? A question identical in principal has been before the Supreme Court of Washington in a number of recent decisions, and we believe these cases decisive of the point.

A statute of the state enacted that a summons to be served by publication should direct the defendant

"to appear withing sixty days after the date of the first publication of the summons exclusive of the day of said first publication." In Thompson vs. Robbins, 72 Pac. 1043, the summons published directed the defendant to appear "sixty days after the service of the summons upon him." The summons was held void, for uncertainty, and not to support a judgment by default. In Owen vs. Owen 84 Pac. 606 the summons published required the defendant "to appear withing sixty days (after the service of this summons exclusive of the first publication of summons) which will be on the 6th day of June 1901." This summons, it was said by the Court, "leaves it indefinite and uncertain as to the time within which appellant was required to answer. This is fatal to its validity."

In Baur vs. Widholm 95 Pac. 277,the published summons read: "you and each of you are hereby directed and summoned to appear within sixty days after the service of this notice and summons upon you exclusive of the date of service." Of this summons the Court said: "It omitted any statement of, or reference to the particular day upon which its service would be completed, and was therefore so indefinite and uncertain in fixing the time of appearance as to render it defective and avoid the judgment."

See also cases cited, 95 Pac. 278.

Now in the case at bar section 48 of the Alaska Code quoted above leaves it optional with the Court to prescribe any length of time for publication deemed reasonable, not less than six weeks.

The summons directs the defendant to appear "within thirty days from the completion of the period of publication." But what is that period? All that the summons reveals is that the order was made on April 23rd, 1908; but whether the period prescribed was six weeks, the minimum, or eight weeks, or three months, the recipient of the notice was left wholly in the dark. We think the summons void.

There being no proof of the mailing of the copy of the summons and complaint on file at the time of the rendition of the decree the Court was without jurisdiction. And the judgment being void when rendered, could not be validated by subsequently filing such proof.

In Gray vs. Larimore 4 Saw. 638, Mr. Justice Field, sitting in the Circuit Court in this Circuit, had before him a judgment rendered in service by publication in which no proof of publication was filed. (Page 646). The judgment was held void. Mr. Fitman in his excellent work on Trial Procedure at Section 281 P. 371, says this "Proof of mailing is indispensable."

But the Court below held it could be supplied at any time afterward to save the judgment. In other

words a void judgment—void on the face of the record—may be validated when attacked, by the filing of an affidavit, even in another and different case.

We think the judgment in cause No. 667-A absolutely void for the reasons stated. If it was void as to Smallwood, for want of jurisdiction as to him, it was void as to all the other defendants under the authority of Gray vs. Larimore 4 Saw. 644.

SECOND

BUT EVEN IF THE JUDGMENT IN CAUSE NO. 667-A IS NOT VOID THE PROCEEDINGS HAD THEREUNDER DID NOT DIVEST THE TITLE OF ALEXANDER SMALLWOOD, AND THE PLAINTIFF HAVING A DEED FROM HIM WAS ENTITLED TO AN INSTRUCTION TO THE JURY TO FIND FOR HIM.

On February, 13th, 1905, Edward Ehrlich sold and conveyed the property in controversy to Alexander Smallwood. Rec. 17-21). This deed was filed for record the same day.

July 18th, 1910, Smallwood, by deed of that date, ,sold and conveyed the same property to the plaintiff. (Rec. 27-29.)

Plaintiff then had the title of Ehrlich the common source, unless that title was otherwise divested out of one or the other of them, in the meantime.

It was the defendant's contention, and the Court held that the decree in No. 667-A, and the proceedings thereunder introduced in the evidence, had this

effect.

Let us examine these proceedings as shown in the record, and see if this contention is tenable.

The decree of foreclosure (Rec. 35-38) purports to be against both Edward Ehrlich and Alexander Smallwood. It is dated the 8th day of December, 1908, and if it had been followed by a proper execution and sale of the interest of both said defendants, and if it were valid, it would have passed their title and there would have been no title in Smallwood for the plaintiff to take by his deed of July 18, 1910.

The defendant, however, failed to introduce any execution whatever against Smallwood. In other words it would appear from this record, inferentially at least, that after the decree was entered the counsel for the plaintiff in that cause became satisfied that the decree was void, at least in so far as the defendant Smallwood was concerned. What the proceedings were under said judgment in 1908 the defendant did not attempt to show, but his exhibit "B", being the United States Marshal's deed (Rec. 39-42) does not recite any decree or foreclosure whatever against Smallwood. The recitals are as follows:

"Witnesseth: That whereas, at the regular December, 1908, term of the District Court of the United States held at the town of Juneau, in and for said District and Division on the eighth day of December, in the year A. D. 1908, J. M. Jenne, plaint-

iff, and L. A. Slane, one of the defendants respectively recovered judgment against Edward Ehrlich, defendant in a certain plea for the following sums, to wit: eleven hundred three dollars and two cents ($1103.02) and twenty-nine dollars and ten cents ($29.10) costs of suit, and six hundred twenty-one dollars and eighty-three cents ($621.83; and

"Whereas, on the 28th day of December, A. D. 1908, there issued out of said District Court an order of sale and execution in the said action for the collection of said judgment, which said order of sale and execution were directed to James M. Shoup, the then United States Marshal in and for said District of Alaska, Division No. One, and that said order of sale and execution were executed by the said James M. Shoup, the then United States Marshal" etc.

The deed then recites a sale of a portion of said property for the sum of one hundred seventy-five and 00-100 dollars ($175.00) to one George Meyers and the payment of the purchase money by him. The recitals then continue:

"Whereas, on the second day of March, 1910, and within twelve months after the confirmation of said sale of said premsies to the said George Meyers, came Edward Ehrlich, the judgment debtor in sair cause entitled J. M. Jenne vs. Edward Ehrlich, Alex smallwood and L. A. Slane, being cause No. 667-A of the records of said District Court, and redeemed said property by paying to Daniel A. Suth-

erland, the United States Marshal, and the party of the first part herein, the sum of one hundred ninety-three dollars and twenty-six cents ($193.26) said sum being the amount of the purchase price paid by the said George Meyers with interest at the rate of 8 per cent. per annum thereon from February 1st, 1908, the date of the sale, together with taxes paid by the said George Meyers thereon after the purchase thereof by him at said Marshal's sale; and the said Edward Ehrlich thereupon received a certificate of redemption executed by the said Daniel A. Sutherland, United States Marshal, bearing date the second day of March, 1910, by virtue of which redemption and certificate the said Edward Ehrlich and his assigns become entitled to a deed of said premises from the said United States Marshal according to law on this 5th day of March, 1910.

"Now, therefore, I, Daniel A. Sutherland, United States Marshal of said District and Division by virtue of my office and by force of the Statute in such case made and provided, for and in consideration of the sum of one hundred ninety-three dollars and 23-100 dollars ($193.23) in hand to me paid by the said Edward Ehrlich party of the second part, have granted, bargained and sold and by these presents do grant, bargain and sell unto the said Edward Ehrlich al the right, title, interest and claim, which the said defendant Edward Ehrlich and Alex Small-

wood on the day of sale aforesaid, had in and to the following described tract or parcel of land, to wit: two lots and buildings thereon'' etc. The defendant also introduced in evidence a Marshal's deed, covering the balance of the property in suit, (Rec. 43-47) which is identical with the above quoted recitals, except it is for another parcel of the property in controversy and the purchaser was L. A. Slane and the purchase price was three hundred dollars ($300.00). The other muniments of title introduced by the defendant was an execution issued against Edward Ehrlich alone, commanding the Marshal to make the sum of nine hundred seventy-nine and 7-100 dollars ($979.07), issued the 8th day of March 1910 (Rec. 48-49) and the return thereunder showing a sale of the property in controversy to the defendant A. J. Boone; an order confirming said sale (Rec. 56-57); and the Marshal's certificate of purchase thereunder (Rec. 58-60).

From the above and foregoing it is clear,

First: That Edward Ehrlich having sold and conveyed the property in controversy to Alex Smallwood in February, 1905, had no title upon which personal judgment in cause No. 667-A could operate.

Second: That such execution against Edward Ehrlich could not affect any title held by Alex Smallwood even though Smallwood was a party to the judgment, as such execution could not empower the Marshal to sell the property of anyone but Ehr-

lich.

Third: The fact that Edward Ehrlich may have attempted to redeem the property and received the deeds from the Marshal shown in the evidence in no way authorized the Marshal or empowered him to convey any title held by Smallwood.

Fourth: A redemption of property from execution sale under the Alaska Code does not convey any title. The effect of such redemption is simply to terminate the sale and leave the title of the property exactly where it was prior to the sale. Sec. 291 of the Alaska Code Page 207 provides among other things, "if the judgment debtor redeem at any time before the time for redemption expires, the effect of the sale shall terminate and he shall be restored to his estate." Of course, it is obvious that the term "judgment debtor" used in the statute refers to the judgment debtor whose property is sold, not to his co-debtor whose property has not been sold.

Summing up then we find the plaintiff with a complete chain of title from and under Edward Ehrlich the common source, of title.

The defendant attempted to meet this evidence by showing that the decree and the proceedings thereunder in some way divested the title out of Smallwood and vested it again in Ehrlich, and that the title of Ehrlich through Smallwood back to Ehrlich passed to him.

But we think it too clear for further argument

that Smallwood's title to the property could not be affected by the decree in cause No. 667-A for the reason:

First: That such decree was void as against him.

Second: For the further reason that such proceedings being directed solely against Edward Ehrlich, in no manner affected the title of Alex. Smallwood. "Freeman on Executions," Sec: Ed. Sec. 335; cites to the effect: that a purchaser at execution sale obtains the title of the defendant in execution and none other.

For the reasons stated the plaintiff in error prays that the judgment of the District Court be reversed with costs and remanded to the lower court with instructions that upon another trial the jury be instructed to render a verdict for the plaintiff.

Respectfully submitted,

J. H. COBB,

Attorney for Plaintiff in Error.